NO. 44756-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JAMES SHARPLES,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR SKAMANIA COUNTY

HONORABLE JUDGE BRIAN P. ALTMAN

HONORABLE JUDGE PRO TEM E. THOMPSON REYNOLDS

BRIEF OF RESPONDENT

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2. With respect to the charging language used in this case on the sentencing enhancement alleging that the appellant refused a test to determine his breath alcohol concentration:
    a. Was the state required to plead the facts underlying this enhancement?
    b. If the State was required to plead the facts underlying this enhancement, did the charging document in this case adequately notify the appellant of the essential factual elements which the State would have to prove?
3. With respect to the jury instructions given in this case on the sentencing enhancement alleging that the appellant refused a test to determine his breath alcohol concentration:
    a. Is the appellant entitled to have the Court of Appeals review those instructions, given that he proposed them?

b. If the appellant is entitled to review, did those instructions unconstitutionally relieve the State of its burden to prove an element of that enhancement?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The appellant, James Sharples, was charged by information with one count of Driving under the Influence—Refusal, two counts of Intimidating a Public Servant, and one count of Custodial Assault, CP 1-3.

The State filed a Notice of Intent to Offer Defendant's Statements, CP 29-30. A hearing under CrR 3.5 was held on November 1, 2012 before the Honorable Judge Brian Altman, RP 2-67. The trial court ruled, without objection from Sharples' trial attorney, that all statements made to law enforcement officers were admissible, RP 67.

A jury trial commenced on March 11, 2013 before the Honorable Judge Pro Tem E. Thompson Reynolds, RP 71. Sharples stipulated to having Judge Reynolds preside over the case, RP 72. Motions in limine were heard on the record, RP 72-89, CP 35-39.

A meeting was held in chambers with both trial attorneys to discuss "the little details . . . need[ed] for . . . a jury trial," RP 89.

The discussion was put on the record with the approval of both attorneys, RP 90-92.

After the jury was selected, the State presented its case-in-chief, RP 106-330. The defense called Sharples as its only witness, RP 331-382, after which the State presented a brief rebuttal case, RP 397-403.

The Court then conducted an on-the-record conference on jury instructions with both attorneys, RP 405-452, after which the jury was instructed, RP 453-472, CP 74-105, and closing arguments made, RP 472-527.

The jury was unable to reach a verdict as to count four (custodial assault), RP 553-555.

As to the other counts, the jury returned verdicts of guilty as to count one (Driving Under the Influence), and not guilty as to counts two and three (both Intimidating a Public Servant), RP 556-557, CP 106, 108-109. The jury also returned a special verdict answering "Yes" to the question:

> Did the defendant refuse to submit to a test of his breath which was requested by a law enforcement officer for the purpose of determining the alcohol concentration of the defendant's breath?

RP 556-557, CP 107.

Sharples was sentenced by Judge Pro Tem Reynolds on March 14, 2013, RP 565-593, CP 4-13. Sharples was allowed to post an appeal bond, staying his jail time pending appeal, RP 593-595.

This appeal follows, CP 14-25.

2. SUBSTANTIVE FACTS

On the evening of May 6, 2012, Skamania County Sheriff Deputy Summer Scheyer was on patrol in Carson, Skamania County, Washington, RP 118. It was a beautiful day, RP 119.

Deputy Scheyer had been a deputy sheriff in Skamania County for "just over eleven years" and had previously been an officer for Bingen-White Salmon, RP 107.

Deputy Scheyer has a degree from Washington State University in criminal justice and completed both the standard three month officer training academy and a three-month on-duty program with a field training officer, RP 108-109. She also completed specialized training in determining when someone is "under the influence of alcohol" including "Centralized Field Sobriety Training" and certification to operate the DataMaster, RP 110. At the time of this incident, she had investigated over one-hundred cases of suspected driving under the influence, RP 114-115.

At 6:45 PM on May 6, 2012, when it was still light out, Deputy Scheyer saw a vehicle that appeared to be speeding, RP 120, 184, 195, 203. She confirmed by radar that it was going 50 miles per hour in a 40-mile-per-hour zone, RP 120-122. She activated her overhead lights, but the vehicle pulled away from her extremely quickly, RP 122. Deputy Scheyer followed, activating her siren, RP 122-123, 353.

Deputy Scheyer saw the vehicle make an erratic, "really sharp", unsafely fast left turn, RP 123-124, cutting through the oncoming lane on the cross street, RP 129. It then made "another really fast right turn," with Deputy Scheyer still following and her siren activated, RP 124-125. Finally, the vehicle came to an abrupt stop, "lurch[ing] right in front of" a house, RP 125. The driver, later identified as the defendant, James Sharples, immediately "jumped out of the car," RP 125-126. There was nobody else in the car, RP 126-127.

Given Sharples' actions behind the wheel, Deputy Scheyer was concerned that he would run away on foot and for officer safety, so she grabbed his arm to handcuff him, RP 131-132. Sharples pulled away and refused to follow directions, RP 131-133, 185. With no other officers present and a non-compliant subject

who was much taller than she, Deputy Scheyer used the lowest level of force defensive technique to take Sharples to the ground, RP 133-136, 185, 199.

Sharples was obviously intoxicated with a strong "reeking" odor of alcohol on his breath, "[b]loodshot, watery, droopy" eyes, and a "flushed" face, RP 136-137. He was yelling at Deputy Scheyer with "repetitive, slurred", non-sensical "and real choppy" speech, RP 137-138. He declined to do field sobriety tests, RP 139-140.

Deputy Scheyer later saw a glass inside his car with a "brown liquid inside" that looked and smelled like liquor, RP 138-139.

In Deputy Scheyer's opinion, Sharples was "extreme[ly] intoxicated, RP 141, 174-175, 194, and "seemed impaired and unable to operate a motor vehicle safely," RP 139. He was placed under arrest for Driving under the Influence, RP 140. During the search incident to arrest, conducted by Deputy Chris Helton who had subsequently arrived, RP 206, Sharples "was having a hard time standing," RP 140. "[H]is balance was off," and the officers "actually had to support him," Id.

Sharples was transported to the local jail, RP 143. During the ride, he continued yelling at Deputy Scheyer in a repetitive manner and called her a profane name, RP 146.

Once at the jail, he alternated between yelling and being argumentative, demanding, angry, combative, and threatening at times but sitting down, being nice, and crying at other times, RP 147, 152, 174, 189-190, 340. He continued to have a hard time with his balance, RP 174.

Sharples was read the implied consent warnings for the breath test to determine alcohol concentration, RP 148-151. He refused to sign the written form confirming he had been read those warnings, RP 151.

When asked if he would give the breath samples, Sharples, while initially agreeing to submit to the breath test, RP 188, 334-335, then said he had a breathing issue known as COPD and was therefore not sure if he could do it, RP 156-157, 188, 334-335, 360. He was advised, pursuant to protocol, that they would try first to see if he could give a breath sample and if not, they would transport him to a hospital for a blood draw, RP 157-158, 188. Sharples agreed to try, RP 360.

Deputy Scheyer began to operate the Datamaster machine and at the proper moment asked Sharples, "[W]ill you give a breath sample at this point?" RP 158-159. Sharples did not blow or make an attempt to blow, even though Deputy Scheyer asked him twice, giving him ample opportunity to blow into the machine, RP 160, 195, 397-398. Deputy Scheyer coded the machine that Sharples had refused the breath test, RP 161, 188.

In his own testimony, Sharples admitted that on the day in question (May 6, 2012), he had been drinking a lot of alcohol "[t]o the point of being intoxicated," RP 332, 352. He agreed with Deputy Scheyer that he was "extremely intoxicated," that he was driving a motor vehicle, and that he should not have been driving, RP 332, 352, 354, 358.

Sharples also claimed in his own testimony that with respect to the breathalyzer, he wanted to take the breath test, RP 379 and "blew as hard as [he] . . . could but it didn't register," RP 361. However, cross-examination revealed that he could have been remembering the portable breath test, not the official Datamaster machine, RP 363-364. Specifically, he remembered "little portable machines" but did not remember "a larger machine," or being in the room with the official machine, RP 363-364.

Deputy Scheyer confirmed that after the process with the official Datamaster machine was completed, Sharples was asked to blow into several portable breath test devices, RP 398-399. The portable breath test is part of the jail booking procedure and unrelated to the investigation for driving under the influence, RP 398-400.

C. ARGUMENT

1. IT WAS NOT IMPROPER FOR THE COURT TO CONVENE AN IN-CHAMBERS MEETING WITH BOTH ATTORNEYS TO DISCUSS LOGISTICAL AND PROCEDURAL ISSUES CONCERNING *VOIR DIRE* AND WITNESSES BECAUSE THESE DISCUSSIONS WERE PURELY ADMINISTRATIVE AND MINISTERIAL AND BECAUSE THE EXPERIENCE AND LOGIC TEST DICTATES THAT THESE SORTS OF DISCUSSIONS ARE NOT SUBJECT TO THE PUBLIC TRIAL RULE.

Before trial commenced in this case, the court conducted an informal meeting in chambers with both attorneys to discuss "the procedure for selecting a jury" including the timing each party would get for its questions, general questions for the jury, the procedure with respect to the alternate juror, and peremptory challenges. RP 90-91. Also discussed were the exclusion of witnesses[1], the

[1] Exclusion of witnesses was a documented motion in limine of the State, CP 35. The motion was also made on the record and granted with no objection from Sharples' trial counsel, RP 73.

witnesses each party intended to call[2], and the trial court's request to have exhibits pre-marked. RP 91-92.

The entire discussion was placed on the record, RP 90-92.

The appellant argues that this informal in-chambers meeting violated the requirement for a public trial because no analysis was done under State v. Bone-Club, 128 Wn. 2d 254, 258-259, 906 P.2d 325 (1995). Brief of Appellant at 7.

It is the appellant's burden to establish a violation of the public trial right, State v. Halverson, 176 Wn. App. 972, 977, 309 P.3d 795 (2013). Under the precedents of this Court and the Washington Supreme Court, a Bone-Club analysis was not required for this discussion, so Sharples has not met his burden.

In State v. Rivera, the Court of Appeals held that a discussion concerning "a juror's complaint regarding another juror's hygiene" and "about seating one juror away from another juror" was not subject to the public trial requirement because it "was a ministerial matter, not an adversarial proceeding," 108 Wn. App. 645, 653, 32 P.3d 292 (2001), review denied, 146 Wn.2d 1006, 45 P.3d 551 (2002). The Court went on as follows:

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[2] The State's witnesses were documented in its filed trial memo, CP 31. The defense had no witnesses other than potentially the defendant himself, RP 91-92.

> This was a ministerial matter, not an adversarial proceeding. It did not involve any consideration of evidence, or any issue related to the trial. *The hearing was akin to a chambers hearing or bench conference, and not part of a trial.* Opening such conferences to the public would not further the aims of the public trial guarantee.

Id. (emphasis added).

In State v. Sadler, the Court of Appeals cited Rivera in stating that there is no "right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts," Sadler, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008), review denied, 176 Wn.2d 1032, 299 P.3d 19 (2013)(emphasis added).

Sharples cites State v. Sublett, 176 Wn.2d 58, 72, 292 P.3d 715 (2012) to argue that "[t]he public trial right *can* attach to a purely ministerial proceeding," Brief of Appellant at 7 (emphasis added).

However, a close reading of the opinions in Sublett shows that while the justices "reject[ed] the Court of Appeals' formulation of the relevant inquiry" in cases such as Sadler and "decline[d] to draw the line with legal and ministerial issues on one side, and the resolution of disputed facts and other adversarial proceedings on

the other," Sublett, 176 Wn.2d at 72, Sharples nevertheless interprets Sublett too broadly.[3]

In rejecting the Sadler formulation, the lead opinion in Sublett reasoned as follows:

> The resolution of *legal* issues is quite often accomplished during an adversarial proceeding, and disputed *facts* are sometimes resolved by stipulation following informal conferencing between counsel.

Id. (emphasis added). Thus, contrary to Sharples argument, the distinction rejected by the State Supreme Court is legal versus factual, *not* ministerial versus adversarial.[4]

This point is further elucidated in the concurring opinion of Justice Stephens, Id. at 136-145 (D. Stephens, concurring).[5] Justice Stephens explains that the Sadler opinion mistakenly equates two "separate concepts", Sublett, 176 Wn.2d at 137 (D. Stephens, concurring). The first concept is

> the distinction between legal and factual issues that sometimes helps determine whether the defendant's presence at a chambers or bench conference is required,

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[3] See also Halverson, supra. At 977 (footnote 2)("[I]n Sublett, our Supreme Court expressly rejected our reasoning in Sadler.")

[4] Even adversarial proceedings are not necessarily subject to the public trial rule. See State v. Miller, 2014 Wash. App. LEXIS 136 at *11-14 (2014).

[5] Since only four justices signed onto the lead opinion, the concurrence of Justice Stephens is essential to establish precedential law. See Miller, 2014 Wash. App. LEXIS 136 at *8 (footnote 5)(2014).

Id. (D. Stephens, concurring), while the second distinct concept is "the distinction between trial matters and *ministerial matters* that *is* relevant to *the public trial inquiry*," Id. (D. Stephens, concurring)(emphasis added).

Justice Stephens goes on to cite Rivera, supra., as a proper application of the concept that "administrative or ministerial matters arising at trial need not be addressed in open court," Sublett, 176 Wn.2d at 138 (D. Stephens, concurring). She explains that it is the "legal/factual distinction" that "is simply out of place in the context of the right to a public trial," Id. (D. Stephens, concurring). Finally, she urges the full court to

> clarify that the only recognized exception to the public trial right grounded in the *type of issue involved* is the one actually applied in Rivera: administrative or ministerial matters arising during trial need not be addressed in open court.

Id. at 139 (D. Stephens, concurring)(emphasis in original).

Since the issues discussed in chambers here were administrative/ministerial, the public trial requirement simply did not apply.

The same conclusion can be reached by applying the test adopted in Sublett for whether the public trial right applies:

> The first part of the test, the experience prong, asks "whether the place and process have historically been open to the press and general public." [citation omitted] The logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." [citation omitted] If the answer to both is yes, the public trial right attaches and the . . . Bone-Club factors must be considered before the proceeding may be closed to the public. [footnote and citation omitted]

Id. at 73 (quoting Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)).

Here, the in-chambers discussion fails both prongs of the test. First, with respect to the experience prong, these sorts of logistical discussions concerning jury selection procedure, witnesses, and the marking of exhibits have historically been conducted in-chambers. Second, with respect to the logic prong, public access would not serve a significant positive role. See Rivera, supra., 108 Wn. App. at 653 ("Opening . . . [bench] conferences to the public would not further the aims of the public trial guarantee.")

Like in Sublett itself, where the Court held discussion concerning the answer to a jury question was not subject to the public trial rule, there were no witnesses, no testimony, and no

perjury risk, Id. at 77. The discussion was placed on the record. Id. This was:

> not a proceeding so similar to the trial itself that the same rights attach, such as the right to appear, to cross-examine witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence.

Id.

Similarly, in Miller, supra., the Court of Appeals held that neither a pre-trial conference held in chambers to discuss a statute nor an in-chambers discussion about proposed jury instructions implicate the public trial rule, 2014 Wash. App. LEXIS 136 at *9-16.

Finally, as noted above, two of the issues discussed (the exclusion of witnesses and the list of State's witnesses) were otherwise part of the public record via the State's trial memorandum, CP 31, 35, and via motions in limine conducted on the record, RP 73.

The Court should uphold Sharples' conviction because the public trial rule was not violated.

2. a. WITH RESPECT TO THE CHARGING LANGUAGE USED IN THIS CASE ON THE SENTENCING ENHANCEMENT ALLEGING THAT THE APPELLANT REFUSED A TEST TO DETERMINE HIS BREATH ALCOHOL CONCENTRATION, THE STATE WAS NOT REQUIRED TO PLEAD THE FACTS UNDERLYING THIS ENHANCEMENT BECAUSE FEDERAL CASE LAW

ESTABLISHING THIS REQUIREMENT ONLY APPLIES TO INDICTMENTS.

The United States Constitution's Sixth Amendment and the Washington State Constitution Article I, Section 22 (Amendment 10) require inclusion in the charging document of the essential elements, statutory and otherwise, of the crime charged so as to apprise the defendant of the charges against him and to allow him to prepare his defense. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); State v. Hopper, 118 Wn.2d 151, 155, 822 P.2d 775 (1992).

Sharples argues that under the recently decided United States Supreme Court case Alleyne v. United States, -- U.S. --, 133 S. Ct. 2151, 186 L. Ed.2d 314 (2013), facts which increase the mandatory minimum sentence also must be included in the charging document, Brief of Appellant at 10-11.

The Alleyne opinion is based upon the previous United States Supreme Court opinion Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), which "concluded that any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime,"

Alleyne, 133 S. Ct. at 2160 (quoting Apprendi, 530 U.S. at 490 (internal quotation marks omitted)).

However, while Alleyne clearly holds facts increasing mandatory minimum sentences must be found by a jury, 133 S. Ct. at 2160, its holding with respect to what must be included in the charging document only applies to *indictments*, Id. at 2161 ("Defining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment.")

But the indictment provision of the United States Constitution does not apply to the States, State v. Ng, 104 Wn.2d 763, 774-775, 713 P.2d 63 (1985). Furthermore, Washington State does not require indictments, Id. at 775 (footnote 2).

In Washington, therefore, the Apprendi line of cases only requires the State to submit certain factual questions to the jury, not necessarily include them in the charging document. See State v. Yates, 161 Wn.2d 714, 758, 168 P.3d 359 (2007)(Apprendi did not concern "the adequacy of the charging document" but "a defendant's right to have a jury determine any facts that could

increase the sentence beyond the statutory maximum for the charged crime.")[6]

For these reasons, there was no requirement that the charging document include all facts necessary to establish the sentencing enhancement concerning Sharples' refusal to submit to a breath test.

b. EVEN IF THE STATE WAS REQUIRED TO PLEAD THE ESSENTIAL FACTS UNDERLYING THE SENTENCING ENHANCEMENT ALLEGING THAT THE APPELLANT REFUSED A TEST TO DETERMINE HIS BREATH ALCOHOL CONCENTRATION, THE CHARGING DOCUMENT IN THIS CASE DID ADEQUATELY NOTIFY THE APPELLANT OF THE ESSENTIAL FACTUAL ELEMENTS.

A defendant may raise a challenge to the sufficiency of the charging document at any time. However, when the challenge is brought initially on appeal, the Court is to

> construe a charging document quite liberally. If the information contains allegations that express the crime which was meant to be charged, it is sufficient even though it does not contain the statutory language. [citation omitted] A court should be guided by common sense and practicality in construing the language. [citation omitted] Even missing elements may be implied if the language supports such a result. [citation omitted]

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[6] But see State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008) (citing Apprendi)("Washington law requires the State to allege in the information the crime which it seeks to establish. [footnote omitted] This includes sentencing enhancements.")

Hopper, 118 Wn.2d at 156. However,

> [i]f the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it. [citation omitted] Moreover, even if a court can discern the presence of the essential elements by such liberal canons of construction, if the accused can nevertheless show "that he or she actually lacked the requisite notice to prepare an adequate defense, the conviction should be dismissed". [citation omitted]

State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995) (quoting Hopper, 118 Wn.2d at 156).

In testing the sufficiency of the charging document, the court must ask:

> (1) do the necessary elements appear in any form, or by fair construction can they be found, in the information; and, if so, (2) can the defendant show he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice. [citation omitted] The first prong requires at least some language in the information giving notice of the missing element. [citation omitted]

State v. Tunney, 129 Wn.2d 336, 339-340, 917 P.2d 95 (1996).

In this case, the State alleged that "the Defendant did refuse to take a test offered pursuant to RCW 46.20.308," CP 2. While Sharples is correct that this language does not "specify that the test refused was a breath test to determine his alcohol concentration," Brief of Appellant at 13, the language is nevertheless sufficient

under the liberal construction rules cited above since the essential element of the test refusal does appear.

In fact, the charging language actually *does* precisely mirror the statutory language of RCW 46.61.5055(1)(b). Sharples cites to State v. Zillyette, 178 Wn.2d 153, 162, 307 P.3d 712 (2013)(quoting City of Auburn v. Brooke, 119 Wn.2d 623, 627, 836 P.2d 212 (1992)) for the holding that "mere recitation of a 'numerical code section' and the 'title of an offense' does not satisfy the essential elements rule", Brief of Appellant at 11. However, this holding is inapplicable to Sharples' case since it refers to mere recitation of the numerical code section and title of the *charge*, whereas here, the numerical code section cited is contained *within* the statute outlining the refusal allegation, RCW 46.61.5055(1)(b).

With respect to the second prong of the required test, Sharples cannot show he was actually prejudiced by the charging document's not specifically stating the exact nature of the test allegedly refused.

Sharples also argues that the

> information failed to apprise [him] . . . of the requirement that the state prove a lawful arrest based on reasonable grounds to believe that he had driven under the influence.

Brief of Appellant at 12. See Section III below regarding whether this is an essential factual element of the refusal allegation that the State must prove.

Even if it is such an element, Sharples' charging document does contain it by a fair and liberal construction since it alleges that he:

> *did* drive a vehicle while under the influence of or affected by intoxicating liquor or any drug; and/or while under the combined influence of or affected by intoxicating liquor and any drug.

CP 2 (emphasis added). Once again, Sharples cannot show any actual prejudice.

The Court should uphold Sharples' sentence under the mandatory minimum for refusing the breath test since he was adequately informed of the elements of this sentencing enhancement.

3. a. WITH RESPECT TO THE JURY INSTRUCTIONS GIVEN IN THIS CASE ON THE SENTENCING ENHANCEMENT ALLEGING THAT THE APPELLANT REFUSED A TEST TO DETERMINE HIS BREATH ALCOHOL CONCENTRATION, THE APPELLANT IS NOT ENTITLED TO HAVE THE COURT OF APPEALS REVIEW THOSE INSTRUCTIONS SINCE HE PROPOSED INSTRUCTIONS IDENTICAL TO THE ONES GIVEN.

With respect to the sentencing enhancement alleging that Sharples refused a test to determine his breath alcohol concentration, the jury was instructed as follows:

> A person refuses a law enforcement officer's request to submit to a test to determine the person's breath alcohol concentration when the person shows or expresses a positive unwillingness to do the request or to comply with the request.

CP 86. The special verdict form asked the jury:

> Did the defendant refuse to submit to a test of his breath which was requested by a law enforcement officer for the purpose of determining the alcohol concentration of the defendant's breath?

CP 107. The jury responded, "Yes". Id.

Sharples argues that this instruction and special verdict form impermissibly relieved the State of its burden to prove an essential element of the "refusal" sentencing enhancement. Brief of Appellant at 15.

However, Sharples is barred from making this argument since he proposed this same instruction and special verdict form verbatim, CP 50, 63. "A party may not request an instruction and later complain on appeal that the requested instruction was given," State v. Boyer, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979).

Boyer also involved a challenge to an instruction as unconstitutionally "reliev[ing] the prosecution of its burden to prove each element of the crime beyond a reasonable doubt," Id. at 343. The Court, however, did "not reach the constitutional issue"

because "[t]he instruction given [was] . . . one which the defendant himself proposed," Id. at 345.

This "invited error" doctrine "is a strict rule," but the State Supreme Court has "rejected the opportunity to adopt a more flexible approach," State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999). The doctrine applies even if the jury instruction given was "clearly erroneous," Id. at 546.

Since Sharples himself proposed the instruction and special interrogatory at issue, he is barred from assigning error to them on appeal, and the Court should for that reason alone uphold Sharples' sentence under the mandatory minimum for refusing the breath test based on the jury's special verdict.[7]

3. b. EVEN IF THE APPELLANT IS ENTITLED TO REVIEW WITH RESPECT TO THE JURY INSTRUCTIONS GIVEN IN THIS CASE ON THE SENTENCING ENHANCEMENT ALLEGING THAT HE REFUSED A TEST TO DETERMINE HIS BREATH ALCOHOL CONCENTRATION , THE INSTRUCTIONS DID NOT UNCONSTITUTIONALLY RELIEVE THE STATE OF ITS BURDEN TO PROVE AN ELEMENT OF THAT ENHANCEMENT.

Substantively, Sharples argues that the instruction and special verdict form with respect to the sentencing enhancement

[7] The invited error doctrine with respect to jury instructions "is not a bar to review of a claim of ineffective assistance of counsel," State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996). However, that argument was not made here.

alleging that he refused a test to determine his breath alcohol concentration impermissibly relieved the State of its "burden to prove a lawful arrest based on reasonable ground to believe that DUI had been committed," Brief of Appellant at 15.

Sharples is mistaken since this is not an essential factual element of the enhancement for criminal trials. In that context, it is a legal issue. Even if it were an essential factual element of the enhancement, the instructions as a whole were sufficient to ensure that all necessary factual findings were made by the jury.

It should first be noted that the instruction and special verdict form used here, CP 86, 107, were standard Washington Pattern Jury Instructions, WPIC 92.03, 92.13. Although these forms were composed before the United States Supreme Court decided Alleyne, supra., they nevertheless were based on the assumption that the factual findings underlying the "refusal" allegation would be submitted to the jury. See "Note on Use" for WPIC 92.03 and 92.13.

The necessary factual findings contained in the instruction were lifted verbatim from the relevant *criminal* statute, RCW 46.61.5055(1)(b), so on that basis alone, the pleadings should be found sufficient.

While RCW 46.61.5055(1)(b) does refer to RCW 46.20.308, which contains the language that Sharples argues should constitute a necessary factual finding, an analysis of the terms of RCW 46.20.308 shows that its primary purpose is to dictate the *administrative* as opposed to criminal consequences of driving under the influence.

In administrative cases, the only issue is whether the person's driver's license is to be suspended, not whether he or she was guilty of driving under the influence. In those situations, therefore,

> the scope of the hearing shall cover the issues of whether a law enforcement officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or any drug . . . , whether the person was placed under arrest, and . . . whether the person refused to submit to the test or tests upon request of the officer after having been informed that such refusal would result in the revocation of the person's license, permit, or privilege to drive . . .

RCW 46.20.308(7). See also State v. Medcalf, 133 Wn.2d 290, 300, 944 P.2d 1014 (1997).

In Norwell v. State Dep't of Motor Vehicles, the State Supreme Court specifically held that

> the implied consent enactment provided a civil administrative proceeding for revoking driving privileges in appropriate instances, *separate and distinct* from the criminal proceedings which might ensue following the arrest of an offending motorist.

83 Wn.2d 121, 124, 516 P.2d 205 (1973)(emphasis added).

As Sharples states, Brief of Appellant at 12,

> [t]he requirement of reasonable grounds [to believe the person had been driving a motor vehicle while under the influence of intoxicating liquor] is separate from the requirement of probable cause.

O'Neill v. Dep't of Licensing, 62 Wn. App. 112, 116, 813 P.2d 166 (1991). *However,* where the arrest was *for* Driving under the Influence (as in Sharples' case), the two requirements can be analyzed together. Id.

While the case law cited above does require these findings to be made in administrative hearings for license revocation, there is no authority for Sharples' proposition that they must be made in a criminal case of Driving under the Influence.

In the context of a criminal case, whether there was probable cause to arrest the defendant for Driving under the Influence is typically a legal determination made by the Court. It is analogous to the question of the validity of a domestic violence no-contact order where a defendant is charged with the crime of violating such

an order, RCW 26.50.110. The State Supreme Court has held that such a question is not an element of the crime but a preliminary question of law for the Court to decide, State v. Miller, 156 Wn.2d 23, 31, 123 P.3d 827 (2005).

The Court of Appeals in Miller had noted that "[t]here may be occasions when validity turns upon a question of fact" and that "in such cases the jury should decide the relevant fact upon proper instructions," 123 Wn. App. 92, 98 (footnote 3), 96 P.3d 1001 (2004), affirmed 156 Wn.2d 23, 123 P.3d 827 (2005).

However, in criminal trials for Driving under the Influence, unlike in administrative license suspension hearings, the jury must find beyond a reasonable doubt that the defendant was driving a motor vehicle while "under the influence of or affected by intoxicating liquor," CP 83, before it can even get to the question of whether he or she refused the breath test. See CP 104 ("If you find the defendant not guilty of driving under the influence, do not use the special verdict form.")

Thus, by convicting Sharples of Driving under the Influence, See CP 106, Sharples' jury necessarily found beyond a reasonable doubt that he had been driving under the influence of or affected by alcohol. Beyond a reasonable doubt is a *higher* standard than

probable cause (or reasonable grounds), so even assuming *arguendo* that the jury *was* required to make a factual finding supporting probable cause to arrest[8], they necessarily did so here.

For these reasons, even if Sharples is entitled to raise this issue on appeal, his sentence under the mandatory minimum for refusing the breath test should be upheld based on the jury's special verdict.

D. CONCLUSION

For the above reasons, Sharples' conviction for Driving under the Influence and sentence under the mandatory minimum for refusing the breath test should be upheld.

DATED this 5th day of February, 2014

RESPECTFULLY submitted,

By: _____
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[8] Since Sharples was arrested for Driving under the Influence, probable cause and reasonable grounds can be analyzed together. See O'Neill, supra.

CERTIFICATE OF SERVICE

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SKAMANIA COUNTY PROSECUTOR

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